AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 284 68 12

THE HUNTTING ELEVATOR COMPANY, PETITIONER,

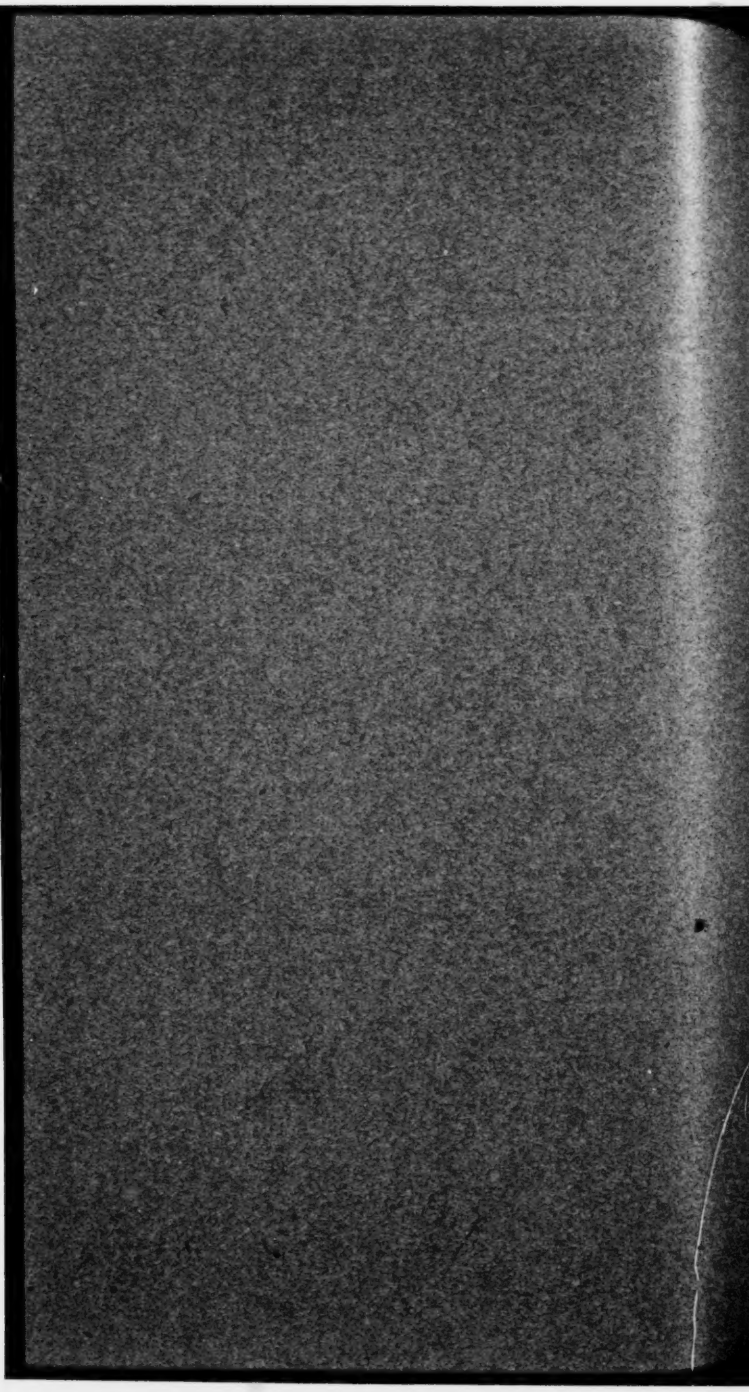
vs.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY, AND THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 26, 1895.
CERTIORARI AND RETURN FILED MAY 28, 1895.

(16,857.)



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a *Transcript of Record.*

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1896.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL. } No. 453.

In the matter of the intervening petition of the Huntting Elevator Company.

C. H. BOSWORTH, Receiver, etc., Appellant,
vs.
THE HUNTTING ELEVATOR COMPANY, Appellee.

Mr. Bluford Wilson, Mr. Philip B. Warren, counsel for appellant; Mr. George R. Peck, Mr. Burton Hanson, Mr. George P. Cary, counsel for appellee.

Transcript of record filed September 13, 1897.
Printed record filed Sep. 25, 1897.

OLIVER T. MORTON, *Clerk.*

b–22 In the Circuit Court of the United States for the Southern District of Illinois. In Chancery.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.* } Consolidated Cause.

In the matter of the intervening petition of the Huntting Elevator Company.

* * * * * * *

23 Afterwards, to wit, on the twenty-sixth day of January, in the year of our Lord one thousand eight hundred and ninety-five, came Huntting Elevator Co., by *his* solicitors, and filed in the clerk's office of said court its intervening petition, which is as follows, to wit:

Intervening Petition of the Huntting Elevator Co.

In the Circuit Court of the United States in and for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW YORK, Complainant,
vs.
THE CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY, Defendant.
} Consolidated Cause.

Intervening petition of the Huntting Elevator Co.

To the honorable the judges of said court:

Comes now your petitioner, The Huntting Elevator Company, a corporation duly organized and existing under and by virtue of the laws of the State of Iowa, having its principal office and place of business at McGregor, in said State of Iowa, and being a citizen of the said State of Iowa, intervening herein and by leave of court first had and obtained, files this its petition, and complaining
24 of the Chicago, Peoria & St. Louis Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, and having its principal office and place of business at Springfield therein, states:

That on the 24th day of September, 1894, your petitioner at the city of Prairie du Chien, Wisconsin, delivered to the Chicago, Milwaukee & St. Paul Railway Company, two car-loads of barley in cars of that company numbered 11836 and 33090, which said two cars of barley were consigned to the Teichman Commission Company, St. Louis, Missouri, by way of East St. Louis; that said two car-loads of barley were transported by said Chicago, Milwaukee & St. Paul Railway Company to its station at Rock Island, the terminus of its line of railroad, and at that place the same was delivered to the Rock Island & Peoria Railroad Company, and by said last-named company transported to Peoria, in said State of Illinois, and there delivered to the Chicago, Peoria & St. Louis Railway Company, to be transported by it to destination; that said last-named company received said two car-loads of barley and transported the same as far as East St. Louis, a station on its line, and while the same were in transit and on their way to destination and in the possession and under the control of said last-named railway company, the said two cars containing said barley were destroyed by fire on the evening of the 28th of October, 1894; that said two car-loads of barley were of the value of eight hundred fifty-five and $\frac{17}{100}$ dollars ($855.17).

That on the 13th day of October, 1894, and on the 15th day of the same month and on the 18th day of the same month your petitioner at Lime Springs in the State of Iowa, delivered to the Chicago, Milwaukee and St. Paul Railway Company, a car-load of barley on each one of said days in cars of that company; to wit:

October 13, 1894, car numbered 34574; October 15, 1894, car numbered 32194, and on the 18th of October, 1894, car numbered 43080; that each one of said cars of barley was consigned to the Teichman Commission Company, St. Louis, Missouri, by way of East St. Louis; that each one of said cars of barley was transported by said Chicago, Milwaukee & St. Paul Railway Company to its station at Rock Island, the terminus of its line of railroad, and at that place each one of said cars were delivered to the Rock Island and Peoria Railroad Company, and by said last-named company transported to Peoria, in said State of Illinois, and there delivered to the Chicago, Peoria & St. Louis Railway Company, to be transported by it to destination; and that said last-named company received said three car-loads of barley and transported the same as far as East St. Louis, a station on its line, and while the same were in transit and on their way to destination, and in the possession of and under the control of said last-mentioned company, the said three cars containing said barley were destroyed by fire on the evening of the 28th day of October, 1894; that said three car-loads of barley were of the value of twelve hundred right dollars ($1,200).

That on the 12th day of October, 1894, your petitioner at Prairie du Chien, Wisconsin, delivered to the Chicago, Milwaukee & St. Paul Railway Company, one car-load of barley in a car of that company numbered 12, and on the 20th day of same October, your petitioner at said city of Prairie du Chien, delivered to said railway company, four other car-loads of barley in cars of that company numbered 178, 7286, 16802 and 46648, which said cars of barley so delivered to said railway company on said 12th and 20th days of October, were consigned to the Teichman Commission Company, St. Louis, Missouri, by way of East St. Louis; that said five car-loads of barley were transported by said Chicago, Milwaukee & St. Paul Railway Company to its station at Rock Island, the terminus of its line of railroad, and at that place the same were delivered to the Rock Island and Peoria Railroad Company, and by said last company transported to Peoria in said State of Illinois, and there delivered to the Chicago, Peoria and St. Louis Railway Company, to be transported by it to destination; that said last-named company received said five car-loads of barley and transported the same as far as East St. Louis, a station on its line, and while the same were in transit and on their way to destination and in the possession and under the control of the said last-named railway company, the said five cars containing said barley were destroyed by fire on the evening of the 28th day of October, 1894; that said five car-loads of barley were of the value of nineteen hundred seventy-one and $\frac{56}{100}$ dollars ($1,971.56).

Your petitioner further shows that some of the barley contained in the cars which were destroyed by fire was not totally burned; that while it was damaged by fire, yet it was not damaged to such an extent that all of it was entirely destroyed; that all of said barley that was not totally damaged and destroyed was cared for and put in condition to be disposed of upon the market and the amount realized on the barley not destroyed, but which was damaged, is

thirteen hundred ninety-two and $\frac{78}{100}$ dollars ($1,392.78), making the total loss to your petitioner, on account of the damage and destruction of its said barley as aforesaid, the sum of twenty-six hundred forty-one and $\frac{95}{100}$ dollars ($2,641.95).

Your petitioner further shows that all of said barley at the time it was damaged and destroyed by fire as aforesaid, belonged to your petitioner, and it was the sole owner thereof.

Your petitioner further shows that on the 21st day of September, 1893, in the suit of The Mercantile Trust Company of New
26–57 York, complainant, against The Chicago, Peoria & St. Louis Railway Company, in the circuit court of the United States, southern district of Illinois, Mr. C. H. Bosworth was, by an order duly entered therein, appointed the receiver of and placed in charge of the property, rights and franchises of said defendant railway company, and as such receiver has ever since the date of his appointment been engaged in managing and operating the railroad of said defendant railway company, in the transportation of persons and property over and upon the same, and that the liability of said railway company to your petitioner was incurred while its railroad was being operated by said receiver, and that the claim and demand of your petitioner herein is of a kind and accrued within a time which entitled it to a priority over rents and demands secured by mortgages, and to a payment by said receiver out of any funds which may come into his hands while operating the railroad of said defendant railroad company.

Wherefore your petitioner prays that said sum of twenty-six hundred forty-one and $\frac{95}{100}$ dollars ($2,641.95) may be allowed against the said receiver appointed as aforesaid; that said claim be declared a lien paramount to all other claims against the property of said Chicago, Peoria & St. Louis Railway Company, prior in right to the claims of mortgages, and a lien upon any money in the hands of said receiver, not otherwise appropriated; that the said receiver be ordered to pay the said amount out of any moneys that may come into his hands or out of the proceeds of the sale of the property of said railway company, before any distribution shall be made of the same, and for such other further orders and decrees as to the court shall seem meet and proper.

THE HUNTTING ELEVATOR COMPANY,
By J. H. ELLSWORTH, *Its President.*

BURTON HANSON,
GEORGE P. CARY,
Its Attorneys.

UNITED STATES OF AMERICA, }
Northern District of Iowa, } ss:

J. H. Ellsworth, being duly sworn, deposes and says that he is the president of The Huntting Elevator Company, the intervener herein; that he has read the foregoing petition and knows the contents thereof, and that the same is true.

J. H. ELLSWORTH.

Subscribed and sworn to before me this 10th day of January, A. D. 1895.

[SEAL.] WM. R. KINNAIRD,
Notary Public.

(Indorsed:) Filed January 26, 1895. James T. Jones, clerk.

* * * * * * *

58 Afterwards, to wit, on the 10th day of April in the year of our Lord one thousand eight hundred and ninety-six, came Stuart Brown, Esq., one of the masters of this court, and filed in the clerk's office of said court his report on said intervening petition, which report is as follows, to wit:

Report of Master in Chancery.

In the Circuit Court of the United States for the Southern District of Illinois.

MERCANTILE TRUST COMPANY *vs.* CHICAGO, PEORIA & ST. LOUIS. } Consolidated Cause.

Intervening petition of the Huntting Elevator Company.

Your subscriber, one of the masters in chancery of this honorable court, to whom the said intervention in the above-styled cause has been referred, would respectfully report that he has taken evidence, heard oral argument and had briefs presented upon the questions raised by the proof and herewith he offers his conclusions.

59 *The Pleadings*

Are the same in effect as were set out in the report of your subscriber on claim of T. McMichael & Son, filed April 8, 1896, and to which reference is hereby made.

The difference is shown in the amended stipulation, as to proof which in this intervention was as follows:

"That said petitioner, The Huntting Elevator Company, is a corporation as alleged, and that at the dates and times, and at the place in its petition mentioned, it delivered to the Chicago, Milwaukee & St. Paul Railway Company (10) ten car-loads of barley in cars, as stated in its petition, consigned to the Teichman Commission Company, St. Louis, Mo., via East St. Louis, Illinois. That written receipts, of which Exhibits B, C, D and E, attached to this stipulation are copies, were afterwards given by said railway company as testified to by the witnesses, S. Y. Hyde and E. J. Tull. That said barley was destroyed by fire at East St. Louis during the night of October 28, 1894; that said barley at the time it was so destroyed belonged to the petitioner and was of the value of two thousand, six hundred and $\frac{95}{100}$ dollars ($2,600.95). That the petitioner was damaged in that sum and is entitled to recover that amount

and interest, if it shall be adjudged that it is entitled to recover in this proceeding."

Evidence as to Ownership and Shipment.

It appears that the Huntting Elevator Company made sales of barley at certain places to Teichman Commission Company of St. Louis, these sales were made by sample, subject to inspection and weighing at St. Louis, Missouri. On September 24, intervenor shipped by C., M. & St. P. from Prairie du Chien, St. Paul cars Nos. 11836 and 33090; October 13th, from Lime Springs, Iowa, St. Paul car No. 34574; October 15th, from Lime Springs, St. Paul car No. 32194; October 18th, from Lime Springs, car No. 43080; October 12th, from Prairie du Chien, St. Paul car No. 12; October 20th, from same place, St. Paul cars Nos. 178, 7286 and 16802 and 46648, all consigned to Teichman Commission Company, St. Louis, Missouri, and freight paid to that place.

The cars were delivered to R. I. & P. Co., at Rock Island, and by them to C., P. & St. L., at Peoria, then transported to East St. Louis by the last-named railroad, and were destroyed by fire at that place on October 28, 1894.

It also appears that the barley destroyed was replaced by intervenors.

My conclusions are like those in intervention of T. McMichael & Son, and for reasons stated there (to which reference is made),
60 that the barley in question belonged to intervenors and that suit was properly brought by them.

I am also of the opinion that either the receiver of the Terminal railroad hold the barley as a common carrier, and that intervenor has a just claim against one of them.

The evidence as to delivery was the same as that in T. McMichael intervention, and my conclusions are the same for the reasons stated in that report.

I reach, therefore, the opinion that the intervenor has a just claim against the receiver in the sum of $3,600.95, and interest thereon at the rate of five per cent. per annum from date of loss to present date, and that it should be paid as the court may order.

All of which is respectfully reported this seventh day of April, 1896.

STUART BROWN, *M. C.*

(Indorsed:) Filed April 10, 1896. James T. Jones, clerk.

Exhibit to Report of Master.

T. McMichael & Son report.

In the Circuit Court of the United States for the Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA AND ST. LOUIS. } Consolidated Cause.

Intervening petition of Thomas McMichael and William McMichael, doing business under the firm name of T. McMichael & Son.

Report of Master.

To the Hon. William J. Allen:

Your subscriber, one of the masters in chancery of this honorable court, to whom the said intervention in the above-styled cause has been referred, would respectfully report that he has taken evidence, heard oral argument and had briefs presented upon the questions presented by the proof, and herewith he offers his conclusions.

The Pleadings.

An intervention filed January 26, 1895, alleges among other things that on the 16th day of October, 1894, the petitioners delivered to the Chicago, Milwaukee & St. Paul Railway Company
61 four car-loads of barley in cars of said company, numbered 37506, 12336, 2598, 4126, and on the 19th day of the same month two other car-loads of barley in cars of said company, numbered 3728 and 18126; and on the 22d day of said month, two other car-loads of barley in cars of said company, numbered 10720 and 6842; also on the 6th of said month one car-load of barley in car of said company, numbered 26088, and on the 22d of said month, two other car-loads of barley in cars of said company, numbered 4268 and 7552; that all of said car-loads were consigned to Teichman Commission Company, St. Louis, Mo., via East St. Louis, Ills.; that all were transported by said C., M. & St. P. Company to Rock Island, Ill., and there delivered to the Rock Island & Peoria Railway Company, and by said last-named company transported to Peoria, Illinois, and delivered to the Chicago, Peoria & St. Louis Railway Company, and were by it transported as far as East St. Louis, and while still in transit and on their way to destination, and in the possession and under the control of said C., P. & St. L. R'y Co. the first-mentioned eight cars of barley and their contents were destroyed by fire on the evening of the 28th day of October, 1894, and damage resulted to petitioners of $2,942.56; that the last-named three cars and the barley contained therein was partially destroyed by said fire, and after its disposal damaged petitioners $226.68, making a

total loss or damage to said petitioners of $3,169.24; petitioners further allege that said barley belonged to them at the time it was so damaged, and that they were the sole owners thereof; petitioners ask for relief and that receiver pay said amount of $3,169.24 as a just claim prior to rights of mortgage bondholders.

On the 11th day of March, 1895, C. H. Bosworth, receiver, filed his answer, alleging that after delivery to the C., P. & St. L., and before the filing of the intervention, the said cars and their contents were delivered, in the due course of business, to the Terminal Railroad Association of St. Louis, and while in their possession said cars were destroyed; and further that they were destroyed by a fire negligently caused by and originated in a spark coming from a certain engine belonging to and being operated by and in the service of the Terminal R. R. Association; and, further, while in the care and custody of said Terminal Association, under a contract whereby the Terminal railroad agreed to give the said receiver terminal facilities, handle trains, care for engines and freight, under a regular interchange of business and according to custom, exercising due care and caution, but said Terminal Association willfully and negligently stored said property in close proximity to a certain load of hay, which was fired by sparks from a certain passing switch-engine of said Terminal Association; and further said Terminal As-
62 sociation caused said fire, by storing said inflammable hay in a veritable fire-trap; receiver denies responsibility, and asks to have Terminal R. R. made a party defendant.

On May 13, 1895, Bosworth, receiver, files a cross-petition, stating that all property mentioned in interventions was in care and custody of Terminal Association under a contract by which said Terminal R. R. was to give receiver terminal facilities, etc., and it was the duty of said association to exercise due care and caution in safe-keeping and handling said cars, but it willfully and negligently stored them in a dangerous place; that said cars were delivered to Terminal Association by receiver in due course of business, and while in the possession and under the care of said association were destroyed; and, although they allowed said cars mentioned in said interventions to be destroyed, they did save all of their said cars; asks for a rule to show cause why it should not be made a party defendant June 1, 1895; rule entered, directed against Terminal R. R. Association, requiring it to show cause on or before June 15, 1895, why it should not be made a party defendant, etc.

June 15, 1895, Terminal R. R. Association by its solicitor, moves court to discharge rule of June 1st, for lack of jurisdiction and other reasons stated. No further action was taken on said rule and said Terminal R. R. Association was not made a party defendant.

August 27, 1895, a stipulation was entered into in this intervention (with others) by counsel for purposes of saving labor and expense of making proof, which said stipulation was afterwards, on January 23, 1896, amended by an order of court, and which stipulation was, in its amended form, as follows:

"That the petitioners, Thomas McMichael and William McMichael are partners engaged in business at McGregor, Iowa, under the firm

name of T. McMichael & Son, as alleged, and that at the dates and times and at the place in their petition mentioned, they delivered to them Chicago, Milwaukee & St. Paul Railway Company eight (8) car-loads of barley, in cars, as stated in their petition, consigned to the Teichman Commission Company, St. Louis, Missouri, by way of East St. Louis, Illinois. That written receipts, of which Exhibits B, C, D and E attached to this stipulation are copies, were afterwards given by said railway company, as testified to by witnesses S. Y. Hyde and E. J. Tull. That said barley was destroyed by fire at said East St. Louis during the night of October 28, 1894; that said barley, at the time it was destroyed, belonged to the petitioners, and was of the value of twenty-nine hundred and forty-two dollars and $\frac{56}{100}$ ($2,942.56); that the petitioners were damaged in that sum, and are entitled to recover that amount, with interest, if it shall be adjudged that they are entitled to recover in this proceeding."

63 (This omits three cars partially destroyed as above stated.)

September 4, 1895, replication, general, to answer of defendants, filed as of March 15, 1895.

October 24, 1895, amendment to petition filed. Alleges for further ground of recovery that upon the arrival of the cars mentioned and described in said petitions at said East St. Louis, and while the same were still in the possession of said receiver, said receiver negligently caused and permitted them, together with their contents to be placed near a wooden warehouse open at sides and ends and filled with combustibles, etc.

November 18, 1895, amended answer of receiver filed. Denies cars were placed by defendant, while same were still in possession of defendant, negligently near warehouse; further expressly denies knowledge of character of said wooden warehouse, affirms they were delivered to and in the custody of Terminal Association under contract, etc.; had no control over care, etc., affirms that intervening petitioners had knowledge, through their assignees, of condition of affairs; further that the cars and contents remained in close proximity to wooden warehouse with full knowledge, approval and consent of the said intervening petitioners, through their agents, the consignees, and thus remained for the convenience of said assignees, and at their risk.

The Evidence as to Ownership and Shipment.

From the evidence it appears that the firm of T. McMichael & Son sold to Teichman & Company by sample, 15,000 bushels of barley in October, 1894, at 58 cents net per bushel in St. Louis, Missouri. The eleven cars specified by number in the petition were shipped from McGregor, Iowa, at the time named, over the C., M. & St. P. railway, and freight to St. Louis was paid by shippers. The cars were delivered to Rock Island & Peoria R. R. and by these to C. P. & St. L. at Peoria, Illinois.

From the evidence it would appear that the custom was to send a sample of barley by express to commission-house at St. Louis,

which made a bid upon it. If the bid was accepted the grain was delivered to the C. M. & St. P. for delivery at St. Louis, via East St. Louis, subject to inspection and weighing.

These cars were transported to East St. Louis by the last-named railroad on November 2, 1894; W. R. Bradley, car accountant of the C. P. & St. L., reported the first eight car numbers burned by fire at East St. Louis, October 28, and last three car numbers as damaged by fire at East St. Louis, October 28th.

On October 30th the consignee Teichman Commission Company wrote to shipper "We are convinced that several of *your cars* were in the lot of burned and damaged barley. We would now 64 suggest that you give notice to your railroad at your end, to push the Jacksonville Southeastern line here, to adjust loss sustained, as speedily as possible."

On November 2d, the consignee telegraphs "Will you replace the burnt barley at once to fill sale."

To which shipper answered:

"Yes, will load tomorrow."

On November 2d, consignee writes as follows:

"We are in receipt of your telegram saying you will replace your barley lost by the late fire; we now have the assurance of the receiver of the J. & S. E. R. R., that they are amply able and anxious to settle the loss of barley by fire, as speedily as possible, which, however, may be delayed by the question arising if the barley is covered by their insurance policy or by the one held by the Terminal Railway Company, which will soon be determined, as that company is co-operating with the J. S. & E. R. R., to effect an adjustment."

On November 3rd, the shipper writes consignee:

"We have made bill for cars X X X and sent same to C., M. & St. P. R. R., and presume they will pay us as soon as they look it up."

Conclusions as to Ownership.

Notwithstanding the stipulation of August 27, 1895, quoted above, the claim is now made that petitioners are not the owners of this barley, but have parted with their title to consignee. Taken in its barest legal sense, delivery is made by a vendor when he gives up his goods to a common carrier for transportation. Even law courts, however, do not hold this rule without exception, but where there is anything to be done as of weighing or measuring, they hold the performance of these things a condition precedent. These were goods sold by sample and the vendee had the right to refuse to accept them if not up to grade. But further, it is very apparent from the acts of the parties that they intended the barley to be delivered at St. Louis. The shipper's willingness to assume the responsibility of an action against the carriers is not, of course, conclusive, but the intention of the parties is clearly displayed by the correspondence after the loss of the consignment where both shipper and consignee immediately act upon the understanding that it was the shipper's loss and that the carrier was the shipper's

agent. The object in a court of equity is moreover to discover the true owner of these goods and not the technical owner, and where the parties in interest agree as to ownership of goods, the carrier is amply protected in any payment he may make.

My conclusion is that intervenors have properly brought suit.

65 *Custom as to Barley.*

It is contended by counsel for defendant that the liability of the receiver cannot be greater than that of warehousemen. This contention is not raised in the answer to the original petition, but may be considered as raised by the answer to the amended petitions. It is, of course, entirely inconsistent with the defense that the car had been delivered to the Terminal Railroad Association, for if they held them as warehousemen, then they had not delivered them. Still, however, admitting the question is subject to discussion, the burden of proof is in such case most certainly cast upon the carrier; its liability as an insurer continued until the cars had reached their destination and been unloaded or placed in a safe warehouse, or place for unloading.

Porter v. Chicago & R. I. R. R., 20 Ill., 407.
C. & N. W. R. R. Co. v. Bensley, 69 Ill., 630.

The destination of the cars was St. Louis, Missouri (see stipulation),

Wabash R. R. v. Jaggerman, 115 Ill., 407,

and it is very uncertain whether consignee, under the circumstances, even if notice to him had been given, could prejudice the rights of the owner by any change of destination. I am of the opinion that either the receiver or the Terminal railroad held the barley as a common carrier. Having reached that conclusion, it is unnecessary to discuss the degree of care exercised.

Do the limitations in the bills of lading or shipping receipts enure to the benefit of connecting carrier?

Certainly not in this case. In the case cited by counsel for defendant, *R. R. Co. v. Mfg. Co.*, 16 Wallace, 318, and which was delivered in a State where no laws had been passed as to limitations of liability the court says: "It is not only against the policy of the law, but a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the term proposed in a notice whether it be general to the public or special to a particular person, merely because he does not expressly dissent from them." But by the laws of Iowa, the shipping point, and by the laws of Illinois, the place of loss, common carriers are prohibited from limiting their common-law liability in any receipt.

Further, it developed from the evidence that the bills of lading as shown, were given subsequent to the destruction of property and simply as evidence of shipment.

"After the goods are shipped, it is too late to impose upon the

shipper a cause exempting the carrier from liability from loss by fire, after such fire has occurred."

Lamb v. Camden & A. R. Co., 4 Daly, 483.

66 I am therefore forced to the conclusion that the owners of this barley have a just claim for its value from one of the common carriers who have transported it, or agreed to transport it.

The evidence is conclusive that the barley was safely carried by C. M. & St. P. to Rock Island and from there carried by the Rock Island & Peoria, to Peoria, Illinois; where it was delivered to the C. P. & St. L. and by it transported to East St. Louis.

The sole question then remains was it delivered by the C. P. & St. L. to the Terminal Railroad Association, for further carriage.

What is the evidence as to

Delivery.

The barley in question was carried by the C. P. & St. L. to the end of its track proper. There is no connection between that point and the Eads bridge or Wiggins Ferry leading to St. Louis, Missouri. The old C. P. & St. L. R. R. having no terminal facilities in East St. Louis for the forwarding of freight prior to the receivership, made an agreement with the Terminal Railroad Association of St. Louis, to furnish the needed facilities. This agreement was made June 1, 1891, and -as never formally re-enacted by the receiver, but his testimony shows that he ratified its and was and is now doing business under it. It provided for the handling of C. P. & St. L. trains, cars of its engines and cars, and the handling and care of freight at the rate of fifty cents for each loaded car and regular freight charges. By it, the Terminal railroad agreed to furnish the necessary yard room, or track facilities, switch-engines, and yardmen in making up and breaking up all freight trains, &c. The course of business under this agreement was for the C. P. & St. L. to carry its freight to the end of its own tracks proper, and then upon certain Y tracks which belonged to the Terminal railroad; here the engine of the C. P. & St. L. to carry its was cut off, and the Terminal engines broke up and the train deposited its cars upon certain tracks in the Terminal yards. These tracks of deposit were not exclusively used by the C. P. & St. L., but the cars seem to have been always placed upon them. A wooden warehouse through which these tracks ran or was near to was not used at the time of the fire by the C. P. & St. L. railway, but was used by a commission company for the storage of bailed hay. This warehouse was, as the evidence shows, a dangerous fire-trap.

From the statement of Calvert, the agent of the C. P. & St. L. at East St. Louis, it appears that the cars containing this barley came to the Y tracks on the following dates:

4126 on October 25, 1894.	10720 on October 26, 1894.
2598 on October 25, 1894.	6842 on October 26, 1894.
12336 on October 26, 1894.	4268 on October 26, 1894.
3728 on October 26, 1894.	7552 on October 26, 1894.
18126 on October 26, 1894.	37506 on October 26, 1894.

67 Two arrived there on the third day before the fire, nine on the second day, and one on the night before.

On the night of Sunday, October 28th, the fire broke out in the wooden warehouse about 11 p. m., and consumed it, together with the cars in controversy, and many others. The origin of the fire does not appear from the evidence, but it is supposed to have resulted from sparks of a passing engine communicated to the hay in the warehouse and fanned by a high wind. Evidence admitted under objection showed that the Terminal railroad attempted to save its own cars first, and would not allow agents of the C. P. & St. L. to direct the movement of engines. The evidence as to course of business further showed that when cars were set on these deposit tracks, they remained there until a waybill was prepared by the agents of the C. P. & St. L., directing their transfer or forwarding to some other point. When this waybill was presented to the Terminal railroad, its engines again took hold of the cars designated, and placed them wherever the waybill ordered. When this waybill was presented to the Terminal railroad, then, and not until then, the car accountant of the C. P. & St. L. made out a junction report. Junction reports in was shown were a general custom of railroads, and were simply a postal card sent to and informing the railroad, which had originated a car of freight, that a car, designated by a certain number, had been delivered to a connecting carrier by the railroad sending the card. Their purpose, of course, being to keep track of cars.

The evidence in this case shows that no waybill for these cars was given to the Terminal R. R., nor was any junction report sent to the C. M. & St. P.

The evidence further shows that no notice was sent to the owner, shipper or consignee of the arrival of said cars at St. Louis, or of the delivery of them to the Terminal railroad.

The evidence also shows that Calvert, the local agent of the C. P. & St. L. made a claim against the insurance company for the value of these cars and contents stating that the fire occurred on October 28, 1894, and consumed this freight in transit. Also, that salvage operations were carried on by the C. P. & St. L., and the result paid to the shipper. Also, that the cars damaged and not entirely destroyed by said fire, were repaired at the cost of the C. P. & St. L. railroad and returned to their owners. The evidence, however, also shows that the receiver ordered insurance claims to be filed because of the time limit imposed by the insurance policies, and that he made salvage and repaired cars after demand upon the Terminal R. R. to do same, and with the understanding that his action should not prejudice any claim he might have against the said Terminal Association.

Whatever bearing these admissions may have with relation to the shippers I have not considered.

68 *Conclusions.*

It may be assumed that the rule in America is that the obligation of a common carrier of goods is to carry them over its own line

and safely deliver to the connecting carrier, and, if there is a necessity for storage, it is considered a mere accessory to transportation.

R. R. v. Mfg. Co., 16 Wallace, 318.

The burden of proof is upon the carrier to show that at the time of loss, without negligence on his part, his liability as insurer had terminated.

P. & P. N. v. C., R. I. & P., 109 Ill., 135.
R. R. v. Mfg. Co., 16 Wall., 318.
Schulter v. Adams Exp. Co., 5 Mo., 316.

The question to be determined is whether anything remains to be done by the carrier in completion of its contract to safely carry and deliver.

Gregg v. Ill. Cent., 147, 556.

"It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by any act indicating the intention to renounce the obligation of a carrier, will not change or modify even his liability."

R. R. v. Mfg. Co., 16 Wall., 318.

Notice must be given consignee.

Carrier who receives goods for further transportation continues liable as carrier until they are received by another carrier, or until he in some way distinctly renounces responsibility.

Conkey v. M. & St. P. R. R. Co., 31 Wis., 619.

Judging this case by the above rules, did anything remain to be done by the C., P. & St. L.?

Was the intention to renounce its obligation indicated by any act?

Was notice given to consignee? Did C., P. & St. L. distinctly renounce its responsibility?

Were the goods left in the sole control of the Terminal railroad?

Under the evidence these questions must be answered adversely to the receiver.

The tracks set apart for the use of the receiver were, as far as this controversy goes, his own. They were his by the agreement of leasing. They were not a destination point. It was not intended nor was it feasible to unload there. After the cars reached that point, they could not be controlled nor taken away by the Terminal railroad, which was simply one of the instruments used by receiver in his carriage of freight. It was only by the further act of the receiver or his agents that the cars could be moved at all. It
69 was not in the power of the Terminal railroad under the lease to change his order of things, whereas, the receiver might at any moment have terminated his responsibility by issuing a waybill, directing the further carriage of the cars to their proper destination.

The supreme court of Illinois have, it is true, in Smyser case, 38th Illinois, said that the mere signing of a bill of lading alone

does not transfer freight, but that is evidence of transfer; they were speaking of the original shipment, and of the initial carrier. In such a case, the acceptance of freight of course controls. So in the case at bar—no bill of lading was issued by the C., M. & St. P., but they accepted the freight and became a carrier by their own act. The terminal railroad did not however accept this freight at East St. Louis. They had no opportunity to do so.

So in *Pratt v. Grand Trunk*, 5 Otto, 43.

Where there was a joint possession and a definite place for deposit of goods destined for transportation, the court properly says, that the goods were under the control of the agents of the R. R. Co.; that they were deposited and received for transportation; that no further orders were expected.

So also, in *Merriam v. Hartford R'y Co.*, 24 Conn., 354, it was held that if a common carrier agree that property may be deposited in a certain place without notice to him, such deposit alone is sufficient delivery, and such agreement may be shown by a constant practice and usage.

But in the case at bar, the facts were the direct converse of these above-recited cases. The usage and custom was shown to require a waybill or special notice.

This case likens itself to the case of *Mt. Vernon Car Co. v. Alabama G. S. R. Co.*, 92 Ala., 296.

I quote from Ray on Freight Carriers:

"The placing of a car by an initial carrier on the side track of the connecting carrier, without giving the latter any notice, and without marking it with the name and address of the consignee, or sending any waybill or shipping directions does not establish the relation of contractors between the initial and the connecting carrier."

The reason of such a rule is apparent on a moment's reflection.

What order or system could be maintained if the hundreds of cars that pour into such a terminal point were without direction? It is also significant in this connection that the junction reports, that the evidence shows were made when a transfer took place, were not made for these cars.

I reach the opinion that the intervenors have a just claim against the receivers in the sum of $3,169.24, and interest at 5% from loss, and that it should be paid as the court may order.

All of which is respectfully reported this 7th day of April, 1896.

STUART BROWN, *M. C.*

70 And afterwards, to wit: on the 27th day of April, in the year last aforesaid, came again the receiver, and filed in the clerk's office of said court, his exceptions to the report of the master, which exceptions are in the words and figures following, to wit:

Exceptions of Receiver.

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petition of the Huntting Elevator Company.

Exceptions of the Receiver to the Master's Report.

Now come- C. H. Bosworth, receiver herein, and excepts to the report of Stuart Brown, master in chancery, filed in the above-entitled matter, on the 10th day of April, 1896, and for cause of exception, shows:

First. For that the said master has reported that the stipulation entered into between the parties on August 27th, 1895, was so amended as to include, among other things, the following clause: "That said barley, at the time it was destroyed, belonged to the petitioner;" whereas the said master should have reported, by order of the court, entered on the 23d day of January, 1896, *the* the said *of* clause above quoted, was stricken from said stipulation.

Second. For that the said master by reference to his repo*tr* filed on the intervening petition of T. McMichael & Son, in above-entitled consolidated cause, on the 8th day of April, 1896, reported his conclusion to be that the intervenor has properly brought suit; whereas, the said master should have reported that the title to the property involved had entirely passed from intervenor, and that at the time said loss occurred, intervenor was not the owner thereof, nor had any right, title or interest therein.

Third. For that the said master has, by reference to his report on the intervening petition of T. McMichael & Son, above referred to, reported that the destination of the cars was St. Louis, Missouri; whereas, the said master should have reported that the destination of said cars, and their contents, was East St. Louis, Illinois.

Fourth. For that the said master has, by reference to his report on the intervening petition of T. McMichael & Son, above referred to, reported that either the receiver or the Terminal railroad held the barley as a common carrier; whereas, the said master should have reported that the barley in question, at the time that it
71 was damaged and destroyed, was in the custody and under the control and management of the Terminal Railroad Association of St. Louis, as a warehous-man.

Fifth. For that the said master has, by reference to his report, on the intervening petition of T. McMichael & Son, above referred to, reported that the limitations in the bills of lading or shipping

receipts, do not enure to the benefit of connecting carriers; whereas, said master should have reported that bills of lading or shipping receipts, under and by virtue of which, said barley was transported, constitute specific contracts, containing a clause exempting the carrier from liability for loss by fire, and that the benefit of said contract enured to each of the connecting carriers, including the receiver.

Sixth. For that the said master has failed and refused to report that the barley in question, at the time of its damage and destruction, had been delivered by the receiver to the Terminal Railroad Association of St. Louis in the due course of business, and was then in the custody of and under the control and management of said Terminal Railroad Association of St. Louis.

Seventh. For that the said master has reported that the intervenors have a just claim against the receiver in the sum of $2,600.95 and interest thereon at the rate of 5 % per annum, from date of loss to April 7, 1896, and that it should be paid as the court may direct; whereas, the said master should have reported that said intervenor was not entitled to recover from the receiver for the loss and damage occurring to the said barley by reason of said fire, and that said petition should be dismissed at petitioner's cost.

Eighth. For that the said master has failed and refused to report that it appears from the evidence that the consignee of said intervenor had entered into a contract with the said Terminal Railroad Association of St. Louis, by virtue of which the latter was holding said barley, at the time of its loss and destruction, as a warehouseman, awaiting further orders as to reshipment from said consignee, and for the convenience of said consignee, as the agent of said intervenor.

Ninth. For that the said master has failed and refused to report that it appears from the evidence that the consignee of said intervenor was acting as its agent, and that said intervenor had full knowledge of the manner in which said barley was being handled in St. Louis, through its agent, the said consignee, and acquiesced therein.

Tenth. For that the said master has failed and refused to report that it appears from the evidence that it was the custom of the consignees of said intervenor to have all grain which intervenor shipped to said consignee held in the yards of the Terminal railroad at East St. Louis, to await further orders as to reshipment; and that
72 said further orders were dependent upon the state of the market and the sales made by said consignee, and for the convenience of intervenor.

Eleventh. For that the said master has failed and refused to report that the obligation of the receiver, as a common carrier, was to transport said barley to East St. Louis only, and there put it on the tracks of the Terminal Railroad Association of St. Louis, in the usual place of deposit, where, the evidence shows, it was the custom, acquiesced in by the intervenors, through its agent the consignee, to have the same remain until said consignee should desire to reship it, whereupon, according to said custom, a separate contract of car-

riage would be entered into with, and a new bill of lading issued to, said consignee.

Twelfth. For that the said master has, by reference to his report on the intervening petition of T. McMichael & Son, above referred to, found and reported that the said receiver was liable to the intervenor, as a common carrier; whereas, the said master should have found from the evidence, that the said receiver, as a common carrier, had in all respects complied with his contract of carriage, by safely transporting and delivering the said grain to East St. Louis, and there depositing it in the customary and usual place for delivery, on tracks designated for that purpose, in the yards of the Terminal Railroad Association of St. Louis, and for that reason is fully discharged from all liability in respect to the loss of said grain by fire.

Thirteenth. For that the said master has found by reference to said report on petition of T. McMichael & Son, that said receiver, as a common carrier, was liable on account of the loss by fire of said grain; whereas, he should have found and reported that the said fire occurred after the said receiver had faithfully delivered the said goods at their point of destination, under the contract with said receiver, and that the said goods were thereafter lost by fire, through the negligence of said Terminal Railroad Association of St. Louis, and not through any default or negligence of said receiver.

And thereupon this receiver prays that the said master's report be annulled and set aside, and that a decree may be entered on said intervening petition, dismissing the same at petitioner's cost.

C. H. BOSWORTH, *Receiver*,
By BLUFORD WILSON AND
P. B. WARREN,
His Solicitors.

(Indorsed:) Filed April 27, 1896. James T. Jones, clerk.

Afterwards, to wit: on the 3d day of March, in the January term of said court, in the year of our Lord one thousand eight hundred and ninety-seven, the following further proceedings were had in said cause and entered of record, to wit:

73 *Order, March* 3, 1897.

United States Circuit Court, Southern District of Illinois, January Term, 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS R. R. CO.

Interventions of—
Chicago, Milwaukee & St. Paul Railway Company;
W. W. Cargill Company;
T. McMichael & Son;
S. Y. Hyde Elevator Company;
Huntting Elevator Company;
Jacob Rau;
Gilchrist & Company;
Henry Rippe;
Carr, Ryder & Engler Company.

It is ordered by the court that the exceptions filed in the foregoing interventions, respectively, by the defendant, receiver of the Chicago, Peoria & St. Louis Railroad Company, to the reports of the master, be and the same are severally overruled and the reports respectively approved.

Afterwards, to wit: on the 5th day of April, in the term and year last aforesaid, the following further proceedings were had in said court in said cause, and entered of record, to wit:

Decree, April 5, 1897.

In the Circuit Court of the United States for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant,
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.*, Defendants.
} In Equity. Consolidated Cause.

In the matter of the intervening petition of the Huntting Elevator Company.

And now on the 5th day of April, A. D. 1897, came again the said intervenor, The Huntting Elevator Company, by Burton Hanson and George P. Cary, its counsel, and the said Mercantile Trust Company of New York by Bluford Wilson, its counsel, and also C. H. Bosworth, receiver herein, by Bluford Wilson and P. B. Warren, his counsel, and this cause coming on to be further heard upon the exception of the said C. H. Bosworth, receiver, to the report of the

master in chancery herein, and the court having heard argument of counsel, and being sufficiently advised, doth order and adjudge and decree that said exceptions be, and they are hereby overruled, and the report of said master is in all things confirmed.

74–356 It is further ordered, adjudged and decreed by the court that said C. H. Bosworth, receiver, pay as a part of the expenses of his receivership, within ninety days from the entry of this decree, the said sum found to be due to said intervenor, The Huntting Elevator Company, to wit: the sum of two thousand six hundred dollars and ninety-five cents ($2,600.95), with interest thereon at the rate of five per cent. (5%) per annum from the 10th day of April, 1896, the date of the filing of the master's report, to the entry of this decree, making a total of principal and interest the sum of twenty-seven hundred and thirty dollars and ninety-five cents, and costs, exclusive of clerk's fee, amounting to sixteen dollars and — cents, making a total of principal, interest and costs of twenty-seven hundred and forty-six dollars and ninety-five cents ($2,746.95).

It is further ordered, adjudged and decreed that inasmuch as the aforesaid amount is properly chargeable to the expenses of the receivership of C. H. Bosworth herein, this decree for the payment of said amount to said intervenor, The Huntting Elevator Company, be and the same is hereby adjudged to be a lien upon all the property and income of said defendant, Chicago, Peoria & St. Louis Company, as it existed and was known during said receivership, in favor of the intervenor, The Huntting Elevator Company, and upon all of the property and income of the purchaser or purchasers, purchased at the foreclosure sale heretofore had, their successors or assigns.

It is further ordered, adjudged and decreed that said lien be and the same is hereby adjudged to be a lien upon all the property and income of said defendant, Chicago, Peoria & St. Louis Railway Company, its said purchaser or purchasers, their successors or assigns, prior and superior to the lien of the mortgage given by said defendant railway company to the Mercantile Trust Company of New York, and to any and all mortgages that may have been placed upon said property by said defendant, or said purchaser or purchasers, their successors or assigns, or which may hereafter be placed upon said property.

And the court having in the original decree and confirmation of sale thereunder specially reserved the right of caption of the property of said Chicago, Peoria & St. Louis Railway Company to enforce the payment of the sum or sums that might be decreed to be liens on said property, it is further ordered, adjudged and decreed that if said amount herein adjudged and decreed to be paid to said intervenor, The Huntting Elevator Company, is not paid within the time herein limited, the said C. H. Bosworth, as receiver, is hereby directed to take possession of all of said railroad property, together with its income, rolling stock and real estate, and operate the same, and out of the net earnings pay the amount due on this decree to the Huntting Elevator Company.

* * * * * * *

357 *Petition of Receiver for Appeal, April 5, 1897.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } Consolidated Cause.

In the matter of the intervening petition of Huntting Elevator Company.

Petition for Appeal.

The petition of C. H. Bosworth, receiver herein, showeth unto your honor that a final decree was entered in the above-entitled cause on the 5th day of April, 1897, whereby it was ordered, adjudged and decreed that your petitioner should pay to the said Huntting Elevator Company the sum of $2,600.95 your petitioner further states to your honor that he has assigned errors upon the record in said cause, specifying errors, as he alleges, in the record and decree aforesaid. He therefore prays that your honor will grant an appeal from the said judgment and decree to your petitioner, upon condition that he enters into bond in the sum of five hundred dollars, with surety to be approved by this honorable court, in such time as your honor shall order and decree.

C. H. BOSWORTH, *Receiver,*
By BLUFORD WILSON,
PHILIP BARTON WARREN,
His Solicitors.

(Indorsed): Filed April 5, 1897. James T. Jones, clerk.

358 *Assignment of Errors by Receiver.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } Consolidated Cause.

In the matter of the intervening petition of Huntting Elevator Company.

Assignment of Errors.

And now comes C. H. Bosworth, receiver herein, by Bluford Wilson and P. B. Warren, his solicitors, and says there is manifest error in the record and proceedings in the above-entitled judgment and decree; and specifies the following, to wit:

1. The court erred in overruling the exceptions filed by the receiver to the report of the master.

2. The court erred in failing and refusing to sustain the exceptions filed by the receiver to the report of the master.

3. The court erred in ordering and adjudging that the petitioner was entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers, purchased at the foreclosure sale of said railway property.

4. The court erred in failing and refusing to order, adjudge and decree that the claim of the intervenor was not entitled to a valid and first lien on the property of the defendant railway company, ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers, purchased at the foreclosure sale of said railway property.

4. The court erred in ordering, adjudging and decreeing that said receiver pay to the intervening petitioner the sum of $1,444.07 with interest thereon from the date of the filing of the master's report, together with the costs in this case.

6. The court erred in ordering, adjudging and decreeing that if said amount was not paid by the receiver within the time there limited, the said receiver be directed to take possession of all of said property and operate the same, and out of the net earnings, pay said amount.

Whereby, the plaintiff in error prays that said judgment and decree be reversed and annulled, with directions to the lower court to dismiss said intervening petition.

BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for C. H. Bosworth, Receiver.

(Indorsed:) Filed April 5, 1897. James T. Jones, clerk.

359 *Bond for Appeal by C. H. Bosworth, Receiver.*

In the Circuit Court of the United States for Southern District of Illinois.

Mercantile Trust Company vs. Chicago, Peoria & St. Louis Railway Company.	Consolidated Cause.

In the matter of the intervening petition of Huntting Elevator Company.

Bond.

Know all men by these presents, that we, C. H. Bosworth, as receiver of the Chicago, Peoria & St. Louis Railway Company as principal, and Bluford Wilson as surety, are held and firmly bound unto the Huntting Elevator Company in the penal sum of five

hundred dollars, for the payment of which, well and truly to be made, the said receiver, as such, binds himself and his successor, and the said surety binds himself, his heirs and personal representatives, jointly and severally, by these presents.

Dated this 31st day of May, 1897.

The condition of this obligation is such that whereas, on the 5th day of April, 1897, in the circuit court of the United States, for the southern district of Illinois, in the above-entitled cause, it was ordered, adjudged and decreed by the court that the above-bounden C. H. Bosworth, as receiver, should pay over to the said Huntting Elevator Company the sum of $2,600.95 and from which decree the said receiver has appealed to the United States circuit court of appeals for the seventh circuit, and upon the condition that the receiver should enter into bond in the sum of five hundred dollars with surety to be approved by the court:

Now, therefore, if the said receiver shall well and truly, without delay, prosecute the said appeal with effect, and shall pay all costs and damages that may be adjudged against him, by reason of said appeal, and all costs that may accrue therein in case of dismissal of said appeal by appellant, then this obligation to be null and void, otherwise to remain in full force and effect.

C. H. BOSWORTH,
As Receiver of the Chicago, Peoria & St. Louis Railway Company. [SEAL.]
BLUFORD WILSON. [SEAL.]

Approved:
WILLIAM J. ALLEN,
United States District Judge.

360 *Order Allowing C. H. Bosworth, Receiver, an Appeal and Approving Bond.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petition of Huntting Elevator Company.

Order Allowing Appeal and Approving Bond.

Now on this first day of June, 1897, the same being one of the days of the January term, A. D. 1897, of this court, comes C. H. Bosworth, receiver herein, and files his petition for appeal from the order and decree of the court entered herein on the 5th day of April, 1897; and it appearing to the court that said petition is in due form, it is hereby—

Ordered, adjudged and decreed that the prayer of said petition be, and the same is hereby granted; that the appeal be, and the same is hereby allowed to said C. H. Bosworth, receiver, from the said order and decree of April 5th, 1897, to the United States circuit court of appeals for the seventh circuit, upon the said C. H. Bosworth, as such receiver, entering into bond in the sum of five hundred dollars, with surety to be approved by this court; which bond it appears to the court is herewith submitted and approved.

Petition of the C., P. & St. L. R'y Co.

In the Circuit Court of the United States, Southern District of Illinois.

MERCANTILE TRUST COMPANY ET AL.
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company *et al.* } Consolidated Cause.

In the matter of the intervening petition of Huntting Elevator Company.

Application of the Chicago, Peoria & St. Louis Railroad Company of Illinois to be Made Party Defendant and for Leave to Appeal.

Now comes the Chicago, Peoria & St. Louis Railroad Company of Illinois, and shows to his honorable court that on the 10th
361 day of July, 1895, a decree was entered in the original foreclosure cause pending in this court, in which The Mercantile Trust Company *et al.* were complainants, and The Chicago, Peoria & St. Louis Railway Company *et al.* were defendants, for the foreclosure and sale of all the property of said defendant railway company; that in and by said decree it was provided, among other things, that the purchasers of said property and their assigns might be made parties to all intervening petitions filed in such original cause, and might also appeal from any decree that might be entered in this court upon said intervening petitions; that on the 21st day of September, 1895, pursuant to said decree of foreclosure and sale, Stuart Brown, Esq., as master commissioner, sold said property to a reorganizing committee, and pursuant to a decree of this court entered herein on the 1st day of February, 1896, executed a deed to said property to the assignees of said reorganization committee, to wit: the Chicago, Peoria & St. Louis Railroad Company of Illinois; your petitioner further respectfully shows that in and by said decree of February 1, 1896, it was provided that the said Chicago, Peoria & St. Louis Railroad Company of Illinois, shall be substituted in place of said reorganization committee as a party to this cause, and shall have the right to appear herein and to procure and defend such proceedings as it may be advised for the protection of its interests; and shall have all the other rights and privileges to which, under said decree of foreclosure and the order confirming the sale thereunder, the purchaser at such sale is entitled.

Your petitioner further respectfully represents unto this court, that on the 5th day of April, 1897, a final decree was entered in the above-entitled cause, directing C. H. Bosworth, receiver, to pay to said intervening petitioner the sum of $2,600.95; and this petitioner further represents unto this court that it has assigned errors, which it charges were made by this court against it in the matter of said intervening petitions, particularly specifying the errors complained of, and now here presents said assignment of errors to be filed with the clerk of this court; and

Thereupon, this petitioner prays that it may be made a party to said intervening petition, and that this court will grant to it an appeal from said final decree; and that the amount of bond and the time within which such bond and certificate of evidence shall be filed may be fixed by this court.

CHICAGO, PEORIA & ST. LOUIS RAILROAD COMPANY OF ILLINOIS,
By BLUFORD WILSON, *Its Solicitor.*

(Indorsed:) Filed July 17, 1897. James T. Jones, clerk.

362 *Assignment of Errors by the C., P. & St. L. R'y Co.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY. } Consolidated Cause.

In the matter of the intervening petition of Huntting Elevator Company.

Assignment of Errors.

And now comes the Chicago, Peoria and St. Louis Railroad Company of Illinois, by Bluford Wilson and P. B. Warren, its solicitors, and says there is manifest error in the record and proceedings in the above-entitled judgment and decree; and specifies the following, to wit:

1. The court erred in overruling the exceptions filed by the receiver to the report of the master.

2. The court erred in failing and refusing to sustain the exceptions filed by the receiver to the report of the master.

3. The court erred in ordering and adjudging that the petitioner was entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers purchased at the foreclosure sale of said railway property.

4. The court erred in failing and refusing to order, adjudge and decree, that the claim of the *inventor* was not entitled to a valid and

first lien on the property of the defendant railway company ahead of the mortgage indebtedness, and upon all of the property and income of the purchasers, purchased at the foreclosure sale of said railway property.

5. The court erred in ordering, adjudging and decreeing that said receiver pay to the intervening petitioner the sum of $2,600.95, with interest thereon from the date of the filing of the master's report, together with the costs in this case.

6. The court erred in ordering, adjudging and decreeing that if said amount was not paid by the receiver, within the time there limited, the said receiver be directed to take possession of all of said property and operate the same, and out of the net earnings pay said amount.

Whereby, the plaintiff in error prays that said judgment and decree be reversed and annulled, with directions to the lower court to dismiss said intervening petition.

BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for Chicago, Peoria and St. Louis Railroad Company of Illinois.

(Indorsed:) Filed July 17, 1897. James T. Jones, clerk.

363 *Bond on Appeal of the C., P. & St. L. R'y Co.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated Cause.

In the matter of the intervening petition of Huntting Elevator Company.

Bond.

Know all men by these presents that we, The Chicago, Peoria & St. Louis Railroad Company of Illinois, as principal, and Bluford Wilson as surety are held and firmly bound unto the said Huntting Elevator Company in the penal sum of five hundred dollars, for the payment of which, well and truly to be made, the said Chicago, Peoria & St. Louis Railroad Company of Illinois as such binds itself and its successor, and the said surety binds himself, his heirs, and personal representatives, jointly and severally by these presents.

Dated this 17th day of July, 1897.

The condition of this obligation is such that whereas, on the 5th day of April, 1897, in the circuit court of the United States for the southern district of Illinois, in the above-entitled cause, it was ordered, adjudged and decreed by the court that the above-bounden

Chicago, Peoria & St. Louis Railroad Company of Illinois should pay over to the said Huntting Elevator Company the sum of $2,600.95, and from which decree the said Chicago, Peoria & St. Louis Railroad Company of Illinois has appealed to the United States circuit court of appeals for the seventh circuit, and upon the condition that the Chicago, Peoria & St. Louis Railroad Company of Illinois should enter into bond in the sum of five hundred dollars, with surety approved by the court:

Now, therefore, if the said Chicago, Peoria & St. Louis Railroad Company of Illinois shall well and truly, without delay, prosecute the said appeal with effect, and shall pay all costs and damages that may be adjudged against it by reason of said appeal, and all costs that may accrue therein in case of dismissal of said appeal by appellant, then this obligation to be null and void, otherwise to remain in full force and effect.

CHICAGO, PEORIA & ST. LOUIS RAILROAD COMPANY OF ILLINOIS,
By F. W. HUIDEKOPER, *Pres't.* [SEAL.]
BLUFORD WILSON. [SEAL.]

Attest: CHAS. D. MEYER, *Secretary.* [SEAL.]

Approved:
WILLIAM J. ALLEN,
United States District Judge.

(Indorsed:) Filed July 17, 1897. James T. Jones, clerk.

364–404 *Order Making C., P. & St. L. R'y Co. Party Defendant, Allowing Appeal, and Approving Bond.*

In the Circuit Court of the United States, Southern District of Illinois.

MERCANTILE TRUST COMPANY ET AL.
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.* } Consolidated Cause.

In the matter of the intervening petition of Huntting Elevator Company.

Order of Court Making The Chicago, Peoria & St. Louis Railroad Company of Illinois Party Defendant and Granting Leave to Appeal from Final Decree.

This cause coming on to be further heard upon the application of the Chicago, Peoria & St. Louis Railroad Company of Illinois to be made a party defendant to the above-entitled intervening petition, and for leave to appeal from the decree entered in this cause on the 5th day of April, 1897, and the court being fully advised in the premises, upon consideration thereof, does hereby grant leave unto said Chicago, Peoria & St. Louis Railroad Company of Illinois to be

made party defendant to said intervening petition; and does also hereby grant unto said Chicago, Peoria & St. Louis Railroad Company of Illinois an appeal from said final decree of this court to the circuit court of appeals of the United States for the seventh circuit upon the said Chicago, Peoria & St. Louis Railroad Company of Illinois entering into bond in the sum of five hundred dollars ($500.00) with approved surety.

* * * * * * *

405–410 And afterwards, on the same day, to wit: on the twenty-fifth day of February, 1898, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Decree. Entered Feb. 25, 1898.

FRIDAY, *February* 25, 1898.

Before Hon. William A. Woods, circuit judge: Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL.

In the Matter of the Intervening Petition of Huntting Elevator Company. } 453.

C. H. BOSWORTH, Receiver, etc.,
vs.
HUNTTING ELEVATOR COMPANY.

Appeal from the circuit court of the United States for the southern district of Illinois.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Illinois and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed, by this court, that the decree of the said circuit court, in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is, hereby remanded to the said circuit court with directions to dismiss the petition.

* * * * * * *

411 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the seventh circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which C. H. Bosworth, as receiver of the Chicago, Peoria & St. Louis Railway Company, and The Chicago, Peoria & St. Louis

Railway Company are appellants and The Huntting Elevator Company is appellee, No. 453, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of Illinois, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court
412 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] Case No. 16,857. Supreme Court of the United States. No. 284, October term, 1898. The Huntting Elevator Company *vs.* C. H. Bosworth, rec'r, &c. Writ of certiorari and return. Filed May 18, 1898. Oliver T. Morton, clerk. Office Supreme Court U. S. Filed May 26, 1898. James H. McKenney, clerk.

413 UNITED STATES OF AMERICA, *Seventh Circuit,* } *ss:*

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company, and The Chicago, Peoria & St. Louis Railway Company, appellants, and The Huntting Elevator Company, appellee, is a full, true, and complete transcript of the record upon which said cause was heard in the United States circuit court of appeals for the seventh circuit, together with all proceedings in said court.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 18th day of May, A. D. 1898.

OLIVER T. MORTON,
Clerk United States Circuit Court of Appeals for the Seventh Circuit.

414 & 415 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1897.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL.

In the matter of the intervening petition of the Huntting Elevator Company.

C. H. BOSWORTH, Receiver, etc., Appellant,
vs.
THE HUNTTING ELEVATOR COMPANY, Appellee.

It is stipulated by and between the parties hereto, by their respective counsel, that the certified copy of the transcript of record filed by the clerk of this court in the Supreme Court of the United States in the application there made for a writ of certiorari in the above-entitled cause, there entitled The Huntting Elevator Company *vs.* C. H. Bosworth, receiver, &c., No. 644, all to the October term, 1897, of said court, shall be taken as the return to said writ of certiorari granted by said Supreme Court in said cause on the 10th day of May, A. D. 1898.

Dated May 16th, 1898.

GEO. R. PECK,
BURTON HANSON,
Solicitors for Huntting Elevator Co.
BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for C. H. Bosworth, Receiver.

Endorsed: United States circuit court of appeals, seventh circuit. Mercantile Trust Company *vs.* Chicago, Peoria & St. Louis Railway Company *et al.* In the matter of the intervening petition of the Huntting Elevator Company. C. H. Bosworth, receiver, etc., appellant, *vs.* The Huntting Elevator Company. Stipulation. Filed May 18, 1898. Oliver T. Morton, clerk.

416 In the Supreme Court of the United States, October Term, A. D. 1898.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY ET AL. } No. 284.

In the matter of the intervening petition of the Huntting Elevator Company.

THE HUNTTING ELEVATOR COMPANY, Petitioner,
vs.
C. H. BOSWORTH, Receiver of the Chicago, Peoria & St. Louis Railway Company, Respondent.

Stipulation for Printing Portions of the Record.

Whereas certain portions of the transcript of record in the above-entitled cause and the cause entitled Jacob Rau, petitioner, *vs.* C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company, respondent, No. 285, October term, A. D. 1898, of this court, such as the amended intervening petition, the answer thereto, as well as the answer to the original intervening petitions, the entire evidence taken, the opinion of the judges of the circuit court of appeals, as well as various other matters, rulings, proceedings, and doings, are in all respects identical:

Now, therefore, for the purpose of saving to the parties the expense of printing the entire transcript of record in the above-entitled cause, it is stipulated and agreed that the entire transcript of record in the aforesaid Rau case shall be printed, and that only the following portions of the transcript of record in the above-entitled cause shall be printed, to wit:

417 1. Intervening petition, found on page 23 and succeeding pages of the transcript of record, and proceedings in United States circuit court of appeals for the seventh circuit, filed in the above-entitled cause in this court, in the matter of the application for a writ of certiorari.

2. Report of master, found on page 58 and succeeding pages of said transcript of record.

3. Exhibit to said master's report, entitled T. McMichael & Son'-report, found on page 60 and succeeding pages of said transcript of record.

4. Exceptions to master's report, found on page 70 and succeeding pages of said transcript of record.

5. Order overruling exceptions to master's report, found on page 73 of said transcript of record.

6. Decree, found on page 73 of said transcript of record.

7. Petition for appeal, found on page 357 of said transcript of record.

8. Assignment of errors by receiver, found on page 358 of said transcript of record.

8½. Appeal bond of said receiver, found on page 359 of said transcript of record.

9. Order allowing receiver's appeal, found on page 360 of transcript of record.

10. Petition of Chicago, Peoria & St. Louis Railway Company to be made a party and for leave to appeal, found on pages 360 and 361 of said transcript of record.

11. Assignment of errors by said railroad company, found on page 362 of said transcript of record.

12. Appeal bond of said railroad company, found on page 363 of said transcript of record.

13. Order making said railway company party and granting appeal, found on page 364 of said transcript of record.

14. Decree of United States circuit court of appeals, found on page 405 of said transcript of record.

418 It is further stipulated and agreed that this cause shall be heard and considered by this court upon the transcript of record in the aforesaid Rau case, No. 285, October term, 1898, of this court, in connection with such portions of the transcript of record in the above-entitled cause as shall be printed under this stipulation, and that the amended intervening petition, the answer thereto, as well as the answer to the original intervening petition, the entire evidence taken, the opinions of the judges of the circuit court of appeals, as well as various other matters, rulings, proceedings, and doings as contained and found in the transcript of record in the aforesaid Rau case, shall for all purposes be treated and considered the same as if they had been printed and included within the printed transcript of record in the above-entitled cause.

Dated July 14th, 1898.

GEORGE R. PECK,
BURTON HANSON,
Counsel for Petitioner.
BLUFORD WILSON,
P. B. WARREN,
Counsel for Respondent.

419 [Endorsed:] Case No. 16,857. Supreme Court U. S., October term, 1898. Term No., 284. The Huntting Elevator Co., petitioner, *vs.* C. H. Bosworth, rec'r, &c., *et al.* Stipulation to omit parts of record in printing. Filed July 23, 1898.

Endorsed on cover: Case No. 16,857. U. S. C. C. of appeals, 7th circuit. Term No., 284. The Huntting Elevator Company, petitioner, *vs.* C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company, and The Chicago, Peoria & St. Louis Railway Co. Filed April 26, 1898.